Chan Kok Choon v United Malayan Banking Corp Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–03–21 OF 1995

MAHADEV SHANKAR, ABU MANSOR AND ABDUL MALEK AHMAD JJCA

20 AUGUST 1996

***Contract** — Settlement — Negotiations for settlement conducted without prejudice — Amount tendered kept in suspense account — Whether there was final settlement between the parties*

The appellant ('Chan') was a guarantor for a loan granted by the respondent ('the bank') to a company ('East-West') which defaulted in the repayment of the loan. Chan was also a guarantor for a loan granted by the bank to another company ('Tectron') which also defaulted. The bank took action against East-West and Chan ('the first action'). The bank also took action against Tectron and Chan and successfully obtained summary judgment. The bank took out a bankruptcy notice against Chan. Chan failed to comply and the bank took out a creditors' petition in the High Court at Kuala Lumpur ('the creditors' petition'). Chan initiated negotiations for a settlement. These negotiations were all conducted without prejudice. Chan claimed that the bank offered to settle provided he paid certain amount in full settlement of his liabilities in both the actions. The bank denied that there was any final settlement and gave notice of its intention to continue legal proceedings and returned all Chan's money put in the suspense account. Chan filed a notice of motion in the creditors' petition to have the notice and the creditors' petition struck out. There was no information in the appeal record as to what happened to this application. Chan also filed a summons in chambers in the first action and prayed for an order that the first action be struck out and that it be stayed pending the disposal of notice of appeal in bankruptcy proceedings in the Temerloh High Court. The application was dismissed. Chan appealed.

Held, dismissing the appeal:

This application was without any merit. The appellant or the documents in the appeal record had not clarified how the Temerloh bankruptcy was in any way connected with the present proceedings. The creditors' petition was a Kuala Lumpur High Court matter and there was no explanation as to what happened to it. Further, all the correspondence passing between the parties was inadmissible. The bank's letters as well as the bank's solicitors' letters were clearly marked without prejudice and so far as the bank was concerned, no settlement was reached. The appellant's letter and the fact that the cheques were put in a suspense account corroborated the bank's contention that no settlement had been reached. The dilatoriness of

the appellant after the further negotiations also proved that there was no final settlement (see p 462E–H). A

[Bahasa Malaysia summary

Perayu ('Chan') merupakan penggerenti untuk pinjaman yang diberikan oleh penentang ('bank tersebut') kepada sebuah syarikat ('East-West') yang ingkar dalam bayaran pinjaman. Chan juga merupakan seorang penggerenti untuk pinjaman yang diberikan oleh bank tersebut kepada sebuah lagi syarikat ('Tectron') yang juga ingkar. Bank tersebut telah mengambil tindakan terhadap East-West dan Chan ('tindakan pertama'). Bank tersebut juga mengambil tindakan terhadap Tectron dan Chan dan berjaya memperolehi penghakiman terus. Bank tersebut telah mengambil notis kebankrapan terhadap Chan. Chan gagal mematuhi dan bank tersebut mengambil petisyen si piutang di Mahkamah Tinggi Kuala Lumpur ('petisyen si piutang'). Chan telah memulakan perundingan untuk penyelesaian. Perundingan-perundingan ini telah dijalankan tanpa prejudis. Chan menuntut bahawa bank tersebut telah menawar untuk menyelesai dengan syarat dia membayar amaun tertentu sebagai penyelesaian penuh atas tanggunggannya dalam kedua-dua tindakan. Bank tersebut menafikan bahawa terdapat apa-apa penyelesaian muktamad dan memberikan notis tentang hasratnya untuk meneruskan prosiding undang-undang dan mengembalikan semua wang Chan yang diletakkan dalam akaun tergantung. Chan memfailkan satu notis usul dalam petisyen si piutang untuk membatalkan notis dan petisyen si piutang. Tiada maklumat dalam rekod rayuan mengenai apa yang telah berlaku kepada permohonan ini. Chan juga memfailkan satu saman dalam kamar dalam tindakan pertama dan memohon perintah bahawa tindakan pertama dibatalkan dan bahawa ia digantung sementara menunggu penyelesaian notis rayuan dalam prosiding kebankrapan di Mahkamah Tinggi Temerloh. Permohonan tersebut telah ditolak. Chan merayu. B C D E F G

Diputuskan, menolak rayuan:

Permohonan ini adalah tanpa merit. Perayu atau dokumen-dokumen dalam rekod rayuan tidak menjelaskan bagaimana kebankrapan Temerloh berkaitan dalam apa-apa cara dengan prosiding sekarang. Petisyen si piutang adalah perkara Mahkamah Tinggi dan tiada penjelasan mengenai apakah yang telah terjadi kepadanya. Selanjutnya, semua surat-menyurat yang beralih di antara pihak-pihak tidak boleh diterima. Surat-surat bank tersebut dan juga surat-surat peguamcara bank tersebut jelas ditandakan tanpa prejudis dan sejauh mana bank tersebut adalah berkenaan, tiada penyelesaian tercapai. Surat perayu dan hakikat bahawa cek telah diletakkan dalam suatu akaun tergantung menyokong hujah bank tersebut bahawa tiada penyelesaian telah dicapai. Sikap berlengah-lengah perayu selepas perundingan lanjut juga membuktikan bahawa tidak terdapat penyelesaian muktamad (lihat ms 462E–H).] H I

Notes

For cases on settlement, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2925–2929.

Appeal from: Suit No C 1797–1985 (High Court, Kuala Lumpur)

Murali Achan (*Vije & Co*) for the appellant.
K Maniam (*Skrine & Co*) for the respondent.

Mahadev Shankar JCA (delivering judgment of the court): This appeal concerns yet another illustration of the extent to which legal processes can be perverted so that banks can be frustrated in their attempts to recover moneys lent to their customers.

East-West Electronic (M) Sdn Bhd ('East-West') had their registered office in Kuala Lumpur. It borrowed money from the respondent ('the bank') on two accounts. The first was an overdraft account ('the OD'). The second was on trust receipts. Both accounts were secured by a continuing guarantee and indemnity agreement dated 12 January 1982 ('the guarantee'). This guarantee was provided by the second to seventh defendants named in the civil suit filed in the court below.

As at 31 December 1984, the amount due on the OD was RM170,392.97 and on the overdue trust receipts it was RM1,075,571.01 with interest continuing till full settlement on both accounts.

Demands for payment were ignored. On 10 April 1985, the bank's solicitors filed a writ C 1797 of 1985 against East-West and all six guarantors ('the first action'). On 19 August 1985, only the second defendant Chan Kok Choon ('Chan') and the fifth defendant Shee Koon Ruay ('Shee') filed a defence. Much of it was a bare denial. The main defence was non est factum claiming that Chan and Shee signed the guarantee in blank. Chan, by the way, is English educated. The bank applied for summary judgment. They did not succeed. The first action therefore had to proceed to trial.

There was another company called Tectron Sdn Bhd ('Tectron') in which Chan had an interest. Tectron also borrowed money from the bank. Chan was a guarantor for this account also. Tectron also defaulted. Sometime in 1985, the bank filed an action C 4278 of 1985 for recovery of these moneys. The bank successfully obtained summary judgment for RM126,498.74 in this action ('the second action').

Chan resides in Temerloh. On 10 January 1991, the bank took out a bankruptcy notice against him. Chan failed to comply. He committed an act of bankruptcy on 5 March 1991. On 18 July 1991, the bank took out a creditors' petition in the High Court at Kuala Lumpur (D5–29–100–91) ('the creditors' petitition').

The bank finally got Chan's attention. He initiated negotiations for a settlement. These negotiations were all conducted without prejudice. We will first say what they contained and then we will comment on their admissibility.

By a letter dated 8 June 1991 (not produced but referred to — appeal record p 65), the bank declined any overtures unless Chan also consented to judgment in the first action. Obviously Chan did not agree and the bank filed the creditors' petition.

On 17 December 1991, there was a meeting between two bank officers and Chan to discuss settlement. Chan's lawyers wrote that day to ask the bank not to proceed with the creditors' petition pending negotiation. Chan claims that the bank offered to settle provided he consented to judgment in the second action, and paid RM375,000 payable RM15,000 up front and balance in 36 monthly instalments in full settlement of his liabilities in both the actions. He supports this claim by a letter he wrote on 26 December 1991 (appeal record p 87).

Obviously the bank did not agree. There was a telephone conversation on 6 January 1992 and Chan sent a further RM10,000 for the up front payment (appeal record p 89).

The bank referred these matters to their solicitors. The creditors' petition due for hearing on 7 January 1992 was adjourned. On 12 February 1992, the bank's solicitors wrote to Chan's solicitors without prejudice as follows (appeal record p 66):

> We refer to your letter of 17 December 1991 and your client's letter to our client dated 26 December 1991.
>
> We have been instructed by our client to inform that your client's proposal of settlement (ie terms contained in your client's letter, a copy of which is enclosed) is under consideration by the bank.
>
> However, our client is of the view that your client had agreed to consent judgment for the total amounts outstanding under the East-West Electronics Sdn Bhd and Tectron Sdn Bhd accounts be entered against him.
>
> Kindly take note that the legal proceedings against your client shall be deferred only upon acceptance of the settlement proposal. Kindly revert to us as soon as possible on this matter.

They wrote again on 14 February 1992 as follows (appeal record p 67):

> Kuala Lumpur High Court Bankruptcy No D2-29-100-91
>
> Re: Chan Kok Choon
>
> We refer to the above matter and to our letter of 12 February 1992.
>
> We have been further instructed by our client to refer to your client's letter of 6 January 1992 (a copy of which is enclosed). Your client had forwarded three cheques totalling RM35,000 in consideration of our client deferring the hearing of the creditors' petition on 7 January 1992. The said cheques were cleared and the amount was placed and is still in a suspense account and not credited into the borrower's account.
>
> Kindly take note that the payment made by your client does not constitute an acceptance of your client's settlement proposals contained in his letters of 26 December 1991 and 6 January 1992 which is still pending approval by our client as stated in our earlier letter of 12 February 1992.

Chan's solicitors replied on 2 March 1992 as follows (appeal record p 68):

Re: UMBC v Chan Kok Choon (East-West Electronics (M) Sdn Bhd)
UMBC v Chan Kok Choon (Tectron (M) Sdn Bhd)

We refer to your letters dated 12 and 14 February 1992 and to your client's letter dated 12 February 1992 to our client.

Our client instructs us to reply thereto as follows.

Our client is shocked and appalled at your client's attempt to get out of the settlement reached between it and him on the abovementioned civil suits. He is dismayed that a banking institution of your client's reputation should vacillate approbate and reprobate after having reached settlement and after having accepted payment.

Our client denies the contents of your said letters.

Your said letters and your client's said letter contains terms that our client never agreed upon — neither is our client prepared to accept any new terms now.

Our client treats your attempts to repudiate the settlement reached as inoperative and intends to keep it alive and continue to be subject to it.

But they did nothing to sustain this contention. Chan's own subsequent conduct confirms that negotiations were still in progress to reach a final settlement. He met the bank's officers again on 16 April 1992 and agreed that no final settlement had been reached and all negotiations were subject to final approval by the bank's management (appeal record p 93).

The bank's solicitors so wrote to Chan's solicitors on 19 May 1992 (not in appeal record but see p 95 of appeal record). Chan's solicitors did not reply. So the bank instructed its solicitors by a letter dated 9 June 1992 to give Chan's solicitors a 7-day ultimatum to confirm agreement or the whole settlement scheme would be aborted (appeal record p 95). The bank's solicitors did so on 16 June 1992 (not in appeal record but see p 97 of appeal record).

On 22 June 1992, Chan's solicitors replied (appeal record p 97). Chan claimed that all that was discussed on 16 April 1992 was additional interest payable and denied everything else. He insisted that both actions had already been settled and that the payment of the RM15,000 and RM10,000 amounted to part performance.

The bank's solicitors replied on 11 July 1992 (not in appeal record but see appeal record p 100). Chan's solicitors refused to accept this. By letter dated 15 July 1992, the bank's solicitors wrote to Chan's solicitors aborting all further negotiations and gave notice of its intention to continue legal proceedings. By letter dated 31 July 1992 to Chan, the bank did likewise and returned all Chan's post-dated cheques and the RM35,000 put in the suspense account.

Chan's solicitors who handled all this correspondence are also on record in the bankruptcy proceedings and in both actions. On 17 September 1992, it would appear that they filed a notice of motion in the creditors' petition to have the notice and the creditors' petition struck out. Chan filed an affidavit in support dated 15 September 1992 (appeal record p 60). Mr Leong Wai Yee affirmed an affidavit on 31 December 1992

opposing the application (appeal record p 76). There is no information in the appeal record as to what happened to this application.

The first action was fixed for hearing on 4 April 1995 (ie three years later). On some date in 1995, Chan's solicitors purportedly filed a summons in chambers in the first action. In it Chan prayed for an order that the first action be struck out and that it be stayed pending the disposal of notice of appeal dated 16 April 1994 in Mahkamah Tinggi Temerloh (Bankruptcy No 29–307–93). This summons in chambers is not dated, nor does it carry any date of hearing. It was purportedly supported by an affidavit of Murali Achan (appeal record pp 42–46). It is also undated. The summons states it is for hearing before the judge in chambers. No date is given. Chan and Shee also affirmed an affidavit (appeal record pp 48–49). It is also not dated (appeal record p 49). It refers to an affidavit of Murali Achan affirmed on 30 March 1995.

Ong Boon Hoo for the bank affirmed an affidavit on 3 April 1995 to resist the application to strike out. According to the chronology contained at the opening pages of the appeal record, the application was dismissed by the deputy registrar on 7 April 1995.

So Chan filed a notice of appeal on 10 April 1995 to the judge. The judge heard the matter on 29 August 1995 and dismissed the appeal.

What we are faced with here are the concurrent findings in the court below that this application was without any merit. We took the same view and dismissed the appeal with costs.

Chan's counsel or the documents in the appeal record have not clarified how the Temerloh bankruptcy was in any way connected with the present proceedings. The creditors' petition is a Kuala Lumpur High Court matter and there is no explanation as to what happened to it.

The bank's solicitors submitted that all the correspondence passing between the parties was inadmissible. The bank's letters as well as the banks solicitors' letters were clearly marked without prejudice and so far as the bank was concerned, no settlement was reached. Having read the correspondence we are of the same view.

Chan's solicitors were contending that a global settlement was reached on 26 December 1991. Their letter of 6 January 1992 shows this was not the case. The fact that these cheques were put in a suspense account corroborates the bank's contention that no settlement had been reached. The dilatoriness of Chan and his solicitors after the further negotiations on 16 April 1992 also proves that there was no final settlement.

In all the circumstances, we are of the view that Chan was just playing for time and was pressured to say anything to get it. So we dismissed the appeal with costs.

Appeal dismissed.

Reported by Jafisah Jaafar